91-1801

Supreme Court, U.S.
FILED
APR 13 1992
OFFICE OF THE CLERK

CASE NO. _____

UNITED STATES SUPREME COURT

FOR THE OCTOBER, 1991, TERM

JAMES R. GILBERT

VS.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

JAMES R. GILBERT (P13971)
IN PRO SE
1010 SOUTH MAIN STREET
CHEBOYGAN, MI 49721
PHONE: 616-627-5636

Questions Presented For Review

Was the trial Court's denial of a new trial based upon newly discovered evidence an abuse of discretion since the new evidence was a demand for loan payment and proof that an original note was in the possession of the contractor (chief Government witness who testified to no loan and n documentation)?

Did the order denying a new trial constitute a new or modified Finding of Fact in that the order stated that the Government's chief witness was untruthful at trial and further that the conviction was based upon telephone tapes and an interview when none of these findings were in the trial Court's original Findings of Fact?

Can the issues raised on appeal to the Court of Appeals and not decided, to wit:

Point II - Order Denying Motion For New Trial is a Modified, New or Real Finding of Fact. Defendant was denied the same prior, thus a new trial should be granted.

Point III - The Findings of Fact by the Court Constitute a Judicial Amendment to the Indictment so as to deprive the Defendant of Notice of the Charges Against Him and to Effectively Destroy His Constitutional Right to have the Grand Jury Determine the Charge Against Him

Point IV - In Light of Modified Findings of Fact as Contained in Denial of Motion For New Trial the Evidence is not Sufficient to Support Verdict

Point V - Perjury of Government Witness Known to Prosecutor Should Result in Mistrial

Point VI - Failure to Provide Material to Defense Counsel that would have Shown Government Witness was Lying Should Result In Mistrial

Point VII - Violation of Sequestration Order Should Result in Mistrial

Point VIII - If none of the Errors Discussed Previously in the Brief are Sufficient, Certainly the Cumulative Effect of These Errors Justify Relief

be raised and decided by this Court or raised and remanded for decision by the Court of Appeals, if the Order Denying a New Trial is found to be a supplemental Findings of Fact since these seven points would be timely?

Can the issue that the indictment does not set forth a crime be raised at any time?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW.....	i
INDEX OF AUTHORITIES.....	v
JURISDICTIONAL STATEMENT.....	1
CONSTITUTIONAL AMENDMENTS.....	1A
CONCISE STATEMENT OF CASE.....	2
ARGUMENT - INTRODUCTION.....	5
POINT I - DENIAL OF NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE WAS AN ABUSE OF DISCRETION.....	10
POINT II - ORDER DENYING MOTION FOR NEW TRIAL IS A MODIFIED, NEW OR REAL FINDING OF FACT. DEFENDANT WAS DENIED THE SAME PRIOR.....	13
POINT III - THE FINDINGS OF FACT BY THE COURT CONSTITUTE A JUDICIAL AMENDMENT TO THE INDICTMENT SO AS TO DEPRIVE THE DEFENDANT OF NOTICE OF THE CHARGES AGAINST HIM AND TO EFFECTIVELY DESTROY HIS CONSTITUTIONAL RIGHT TO HAVE THE GRAND JURY DETERMINE THE CHARGE AGAINST HIM.....	20

POINT IV - IN LIGHT OF MODIFIED FINDINGS OF FACT AS CONTAINED IN DENIAL OF MOTION FOR NEW TRIAL THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT VERDICT..... 26

POINT V - PERJURY OF GOVERNMENT WITNESS KNOWN TO PROSECUTOR SHOULD RESULT IN MISTRIAL..... 48

POINT VI - FAILURE TO PROVIDE MATERIAL TO DEFENSE COUNSEL THAT WOULD HAVE SHOWN GOVERNMENT WITNESS WAS LYING SHOULD RESULT IN MISTRIAL..... 52

POINT VII - VIOLATION OF SEQUESTRATION ORDER SHOULD RESULT IN MISTRIAL..... 56

POINT VIII - IF NONE OF THE ERRORS DISCUSSED PREVIOUSLY IN THE BRIEF ARE SUFFICIENT, CERTAINLY THE CUMULATIVE EFFECT OF THESE ERRORS JUSTIFY RELIEF..... 59

CONCLUSION..... 60

APPENDIX

FINDINGS OF FACT UPON TRIAL WITHOUT JURY..... A1

ORDER DENYING MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE FOR EVIDENTIARY HEARING..... A13

ORDER OF COURT OF APPEALS AFFIRMING ORDER DENYING MOTION FOR NEW TRIAL..... A16

INDEX OF AUTHORITIES

	Page
Federal Rules of Criminal Procedure, Rule 12(b), 18 U.S.C.A.	24
Federal Rules of Criminal Procedure, Rule23(c)	14
Federal Rules of Criminal Procedure, Rule 33, 18 U.S.C.A.	10
Federal Rules of Evidence, Rule 615	56
18 U.S.C., Section 1001	23
United States Constitution - Amendments V and VI	1A,25
Wharton's Criminal Procedure, 13th Ed., Vol. 2, Indictment and Information, 208	26
Perkins v. LeFevre, 691 F.2d 616 (CA2 1981)	49
State v. Frost, 105 Conn. 326, 135 A. 446	14
United States v. Agurs, 437 U.S. 97 (1976)	49
United States v. Allen, 88-5250 (6th Cir. 1989)	25

United States v. Bledsoe, 531 F.2d 888 (8th Cir. 1976)..... 60

United States v. Callanan, 87-2034/2036 (6th Cir. 1989).... 26

United States v. DeLuna, C.A. Tex, 1955, 228 F.2d 114.... 46

United States v. Farnham, 791 F.2d 331 (4th Cir. 1986).... 59

United States v. Gilbert, 813 Fed.Sup. 2d (9th Cir. 1987)..... 24

United States v. Gimbel, 830 Fed.Rep. 2d 621 (7th Cir 1987).. 23

United States v. Greschner, 802 F.2d 373 (10th Cir 1986).... 58

United States v. Guglielmini, 384 F.2d 602, 607 (2nd Cir 1967)..... 60

United States v. Kilpatrick, 821 Fed.Rep. 2nd 1456 (10th Cir 1987)..... 21

United States v. Mack, 837 F.2d 254 (6th Cir 1988)..... 47

United States v. Morales, 902 F.2d 604, amended 910 F.2d 467..... 10

United States v. Pupo, 841 F.2d 1235 (4th Cir. 1988)..... 24

United States v. Runnels, 86-1923 (6th Cir. 1989)..... 25

United States v. Semensohn, 421 F.2d 1206 (2nd Cir. 1970)..... 60

United States v. Shelton, 848 Fed. 2d 1485 (10th Cir 1988).... 24

United States v. Silberman, D.C. Fla. 1979, 464 Fed. Supp. 866..... 20

United States v. Tencher, 89-3012/3015/3018 (6th Cir. 1990)..... 52

United States v. Wallach, 89-1544 (2nd Cir 1991)..... 49

United States v. Zangger, 848 Fed.2d 923 (8th Cir. 1988)..... 23

There are no official or unofficial reports of opinions delivered in this case by other courts or administrative agencies.

Jurisdictional Statement

The U.S. Court of Appeals for the Sixth Circuit rendered an order affirming the trial Court's decision not to grant a new trial on newly discovered evidence on November 15, 1991. A request for rehearing was not accepted on December 16, 1991. This Court granted the Petitioner an extension of time to and including April 13, 1992, to file this Petition. That Order extending time for filing was dated January 23, 1992.

This Court has jurisdiction to review the Judgment in question by Writ of Certiorari pursuant to Title 18 U.S.C. 3736.

The Constitutional provisions involved in this case are Amendments V and VI of the U.S. Constitution.

Amendment V

Rights of persons charged with crimes; guaranty of life, liberty and property. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

Trials of criminal cases; rights of accused. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Concise Statement of Case

Defendant, James R. Gilbert, was convicted in August, 1987, by a trial before the Honorable James Churchill, U.S. District Judge, for the crime of making a false statement to the United States of America. 18 USA 1001.

The Court entered its Findings of Fact on August 14, 1987, a few days after the conclusion of testimony. The Defendant was sentenced to 6 months confinement, to be released after 2 months, with no fine and no costs. The sentence has been served.

Defendant filed a Motion For New Trial based on newly discovered evidence. That Motion was denied on November 11, 1991.

The Defendant appealed and alleged that the Order Denying the New Trial was also a modified or new Findings of Fact.

The Court of Appeals ruled that there was no abuse of discretion in denying the Motion For New Trial and did not consider the other 7 points raised in the appeal.

Project History

February 28, 1982	Preapplication for 24 unit project
September 17, 1982	Borrower's Loan Agreement, Elk Rapids
October 29, 1982	Owner & Contractor Contract
September 22, 1983	Preconstruction Conference Meeting
October 24, 1983	Closing - Interim Lender
October 26, 1983	Construction Begins
July 30, 1984	Cost Certification
August 9, 1984	Final FmHA Closing
July 21, 1986	Granger's telephone call to Gilbert
July 22, 1986	Granger's call to Gilbert's office
July 23, 1986	Granger's call to Gilbert's office
July 30, 1986	Gilbert/Federal Agents interview.
August 4, 1986	Granger's call to Gilbert's office

October 6, 1986	Body tape. Granger/Gilbert

Witnesses at Trial - 8 days

Government Witnesses:

Temple	Farmers Home
Goudreau	Farmers Home
First of America/ Straits Area Federal Credit Union	Financial transactions
Kortyka	FBI Agent
Hane	Inspector General
Granger	Contractor
LaHane	Glaser Lumber

Defense Witnesses:

French	Farmers Home
Cole (Kole)	Architect-Engineer TESTIMONY APPEARS AT PAGES 1092-1116
Gilbert	Defendant

Rebuttal Witnesses:

Kortyka	showed Promissory Note form

ARGUMENT

Introduction

It is extremely difficult to represent oneself even if one is an attorney and more difficult to prepare this writ. All one wants to do is holler, "I'M NOT GUILTY. WHAT WENT WRONG?", but the Court hears that all the time. Conversely, what is one to do when one believes in his innocence and further believes he was shortchanged by the very system that he is part of. It is not encouraging to read and reread discretion of the trial court when that's where it went wrong.

Defendant is not unexperienced in trial and court room evidence. Defendant left the court room confident that an acquittal would follow.

Defendant believed the Court tolerated misconduct because the Court had made a decision of not guilty. When,

in fact, the Court found Defendant guilty, the only rational explanation was that Granger's testimony was believed, and Gilbert's testimony was not.

In denying the Motion For New Trial that is being appealed, Judge Churchill stated that Granger was dishonest but that did not matter since the conviction was based on telephone tapes and Agent interviews of Gilbert.

Even yet today the Judge has failed to state what he heard in any of the tapes or what in the Agents' interview established the elements of the crime.

The most we have in this case is the Judge at hearing on the first Motion For New Trial on September 30, 1988, in discussing the body tape, stated that "the tape came across as a statement by a guilty man".

The Defendant is entitled to a more

objective analysis and review of the evidence.

The case in chief centered on the issue of whether the money given by Granger to Gilbert was a loan or a kickback and whether Gilbert knew the money was coming out of hard costs. There was no testimony other than Granger's to show that Gilbert knew the money was coming out of hard costs. There was nothing on the tapes or in the agents' interview. In fact, the recorded conversations of Gilbert and Granger and the agents' interview showed just the opposite.

Hard costs are monies due materialmen or subcontractors as contrasted to the profit, overhead, and general requirements which are the contractor's monies. On this project the contractor's monies were estimated to be

a total of $73,853. The contractor can do what he wants with his funds, in fact, the contractor and developer can be one.

Likewise, no one is challenging the fact that the money went into the project. In essence, Gilbert borrowed more than he should have.

If the Denial of Motion For New Trial Based on Newly Discovered Evidence results in a modification, clarification, or any other change in the original Findings of Fact, the Defendant in a criminal case should be allowed to raise any issue on appeal and those issues should be considered, especially the issue of whether the evidence supports the finding of guilt and issues flowing directly from the modification.

The State of Michigan is attempting to take away Defendant's Real Estate Broker's license because of this

conviction. On October 14, 1991, Granger testified under oath, with Gilbert asking the questions, as follows:

Q And was it your understanding that, regardless if I was a good guy or a bad guy, it was my duty to repay you the 49 grand, whether I did or didn't, it was my duty to?

A That's right.

Q So you're telling this trier of fact today that the $49,000, with whatever documentation there was, was intended to be a loan from word get go?

A That's what it was intended for is a loan from the get go.

Q And I was just a fink and didn't repay it, right?

A That's right.

Q Is that it now? Is that the bottom line? That's why you're mad at me?

A You know we haven't got much love between us.

Q But it's the fact that I didn't repay you, right?

A Yeah.

The other issues in this Petition have been raised previously in the lower

Court and since the Court of Appeals refused to review any issue other than the abuse of discretion, the same issue, captions, and numbering system has been maintained for the sake of clarity.

POINT I

DENIAL OF NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE WAS AN ABUSE OF DISCRETION

The first Motion For New Trial was based upon evidence that the CPA for Dornet Village furnished documentation that the $25,000 Note was treated as a loan on the corporate books and also furnished a copy of the Note.

The second Motion For New Trial or in the alternate an Evidentiary Hearing was filed after Defendant received a demand for payment on the Note from Granger's attorney, Mr. Ujlaky. Gilbert, along with a retired police officer, visited Mr. Ujlaky's office. They were shown the

original Note and a demand for payment with interest calculated to that date.

The Court denied both of these Motions and upon entering its last order of denial, stated that Granger's credibility was not at issue and that the existence of the Note was not important.

The cases are quite clear that there must be an abuse of discretion. However, this Court may review the record to see if the decision is supported.

> Trial court's power to grant new trial in interest of justice implies, in extreme cases anyway, duty enforceable by appellate court. Federal Rules of Criminal Procedure, Rule 33, 18 USCA.
>
> US vs. Morales, 902 F.2d 604, amended 910 F.2d 467.

A jury will acquit if this case is tried again. The Judge could very well be right that he would not acquit, but in a new trial, the fact that the original Promissory Note was in Granger's

possession and the subsequent demand for collection of said Note bolsters Gilbert's credibility (Judge did not address). The only rebuttal at trial was an attempt by the Prosecution to show that the Promissory Notes were created by Gilbert after he became the target of the investigation. The fact that someone saved this Note for seven years means something. Also, where has the original Note been since Agent Hane asserted that he had all of Granger's records, yet he failed to produce this Note.

Granger not only lost credibility as to his original testimony but became a witness for the defense. If a new trial was granted it would be shown that Granger previously would say anything to get the benefit of his hoped for plea. On October 17, 1987, after Defendant's trial, Granger was indicted in the

Western District of Michigan, Case No. G-87-111-CR. Two projects were mentioned, one a HUD project and the other a FmHA project. The supplier who gave money back to Granger was Glaser Lumber Company. The time frame on the first project was May 4, 1981, to July 12, 1982, and the kickback allegedly was $272,339.47. Kickbacks occurred on the second project May 17, 1983, to August 2, 1983, and was alleged at $171,504.72. It is Gilbert's understanding that Granger pled guilty to one count.

POINT II

ORDER DENYING MOTION FOR NEW TRIAL IS A MODIFIED, NEW OR REAL FINDING OF FACT. DEFENDANT WAS DENIED THE SAME PRIOR.

Defendant waived a jury and yet had no idea of the consequences of that action if the trial court decided the case on something less than the evidence.

Rule 23 of Criminal Procedures states:

> (c) Trial Without a Jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

The Notes of Advisory Committee on Rules directs one to State vs. Frost, 105 Conn. 326, 135 A. 446.

> Questions available on appeal in jury case are available on appeal in case tried to court.

In a criminal case tried by the court, it makes a finding of the facts upon which its conclusions are reached. Its Findings should contain the subordinate facts found and then the conclusions reached from those subordinate facts.

State vs. Frost, continued:

> Court's conclusions of fact from subordinate facts and conclusions of law must be stated in findings, and conclusion of guilt beyond reasonable doubt can be tested only by determining whether subordinate facts

fairly support it.

It is essential that the conclusions reached by the court should be stated in the finding. If these be conclusions of fact based upon the subordinate facts, these should be stated. If these be conclusions of law reached by the court of its own motion, or in passing upon claims of law made by either party, these should be stated. A conclusion in the finding that the accused had been proved guilty, as charged, beyond a reasonable doubt, could only be tested on appeal by determining whether the subordinate facts fairly supported this conclusion.

Every substantial right of appeal and same procedure, as nearly as possible, in jury case, must be assumed to apply to a case tried to court.

Here the trial court, in its Findings of Fact Upon Trial Without Jury said:

Page 6 - "It is far more likely than not that the fraudulent kickback scheme had been negotiated prior to September 17, 1982, when the defendant represented that $34,400 and $14,160 would be contributed by his own funds, but this fact is not essential to the Court's finding."

Page 5 - "There was no evidence that

the defendant had knowledge of the exact source of the $49,000, but the Court finds that the defendant had knowledge that the $49,000 kickback had a source hidden somewhere in the $606,392 construction cost..."

Page 4 - "Granger's testimony that there was a mutual understanding of nonrepayment is totally confirmed by the content of the conversations between Gilbert and Granger. Likewise, there was no intention on the part of either Gilbert or Granger that the $49,000 or any part of it was in payment for past or future legal services."

Page 4 - "It is absolutely clear from the evidence that neither Gilbert nor Granger intended that the money would ever be paid back."

Defendant asserts that these Findings are not possible from the evidence without believing Granger and giving credit to his testimony.

In an appeal brief on this case the Government quoted the testimony of Granger to establish that Gilbert knew the money was coming from other than Granger's funds. Neither attorney quoted telephone tapes nor were the tapes

included as evidence.

Appellee's Brief on Appeal, Page 6, Lines 14-27, reads as follows:

> At the initial meeting with Granger, the defendant stated that he needed money "to close the deal". (Id. 395). In a later phone conversation, he asked Granger to give him the 7% of the project, or about $49,000. Granger agreed but said he would not do the job for no profit. (Id. 398). In yet another conversation, the defendant told Granger that if Granger couldn't come up with the $49,000, Gilbert would "find somebody that could because he (Gilbert) needed it for the closing." (Id. 402). During this second phone conversation, Granger mentioned that what they were planning was not legal. (Id. 407-408). Granger then made an arrangement with the carpentry and shingles supplier to purchase those items for less than the amount shown on the FmHA form. (Id. 409-410).

The Findings of Fact do say that the testimony of Granger was confirmed by conversations between Gilbert and Granger. The difficulty is that Granger testified as to the conversation as well

as Cole, Gilbert, and the Federal Agents. This paragraph did not say tape conversations which is possible reading now that the Judge has made subsequent rulings. It is not a reading Defendant gave it earlier. It does not say that this evidence would stand by itself. It still gives credit to Granger's story over Gilbert's. The Judge never indicated that Granger was not believed, leaving the implication that he was. The Court now says Granger's credibility was unimportant and that Granger was, in fact, a dishonest person. The Order Denying Motion For New Trial or in the Alternative For Evidentiary Hearing dated November 23, 1990, stated:

> Based primarily upon Gilbert's recorded telephone conversations, the Court concluded that the money was a kickback. Gilbert's statements when interviewed in his law office are inconsistent with his present position that the money was a loan. The fact that Granger has now decided

> to attempt to squeeze some money from Gilbert may tend to impeach Granger's credibility. Gilbert's conviction, however, did not depend upon Granger's credibility. To the contrary, it was apparent at the trial that Granger was a dishonest person.

This Order also tells us that the body tape quoted in Appellee's Brief was not seriously relied upon nor did the court rely significantly on the financial statement that both Appellee and Appellant believe is proof for their position.

No where in the original Findings of Fact is Granger's credibility evaluated and no where is the content of the tapes mentioned. Neither Cole's nor Gilbert's testimony is evaluated, and how their testimony compares to the agent's version of the interview is left unanswered.

> Defendant's request for special findings must be granted, and court's findings, reasoning and conclusions must be adequate to enable intelligent appellate review of basis

for decision. U.S. v. Silberman, D.C.Fla. 1979, 464 F.Supp. 866.

POINT III

THE FINDINGS OF FACT BY THE COURT CONSTITUTE A JUDICIAL AMENDMENT TO THE INDICTMENT SO AS TO DEPRIVE THE DEFENDANT OF NOTICE OF THE CHARGES AGAINST HIM AND TO EFFECTIVELY DESTROY HIS CONSTITUTIONAL RIGHT TO HAVE THE GRAND JURY DETERMINE THE CHARGE AGAINST HIM.

This issue was argued on the original appeal. The Court has since heard many McNally cases that are somewhat similar. Defendant's attorney correctly stated:

> The position of the Defendant/Appellant is that the government charged the Defendant with falsifying a specific form, 1924-13 (Exhibit 8 at trial), by not disclosing the amount of a kickback between himself and the contractor. While the 1924-13 did require disclosure of certain kickbacks between other entities in the construction process, it did not require the Defendant to make the specific disclosure charged in the indictment, that being, any kickback

between himself, as developer, and the contractor.

In addition to argument already briefed in this case, Defendant relies on U.S. v. Kilpatrick, 821 Fed.Rep. 2nd 1456 (10 Cir 1987), that provides that the "Court cannot by implication add an essential element to an indictment."

Dick Temple, the person in charge of the multi-family housing program for the State of Michigan for Farmers Home Administration, stated the fact that the 1924-13 form did not apply between contractor and owner. The language of the form puts developers and contractors on one hand and subcontractors, materialmen, and labor on the other hand. The form deals with kickbacks between the one hand and the other hand.

Q "You're saying essentially from Farm Home's reliance standpoint, you would expect if there was some kind of arrangement between

the contractor and developer, that based on other forms, basically the identity of interest form, that you require early on in the process, there be some disclosure to you, either by the developer or by the contractor?"

A "Yes." (Tr. V:847)

Q "Basically, your statement was that the contractor and developer, on the one hand, versus the material men, suppliers and labor that's covered by the kickback language on the 1924-13 --"

A "Yes, sir."

Q "Had there been any financial arrangements between the developer and the contractor, you would have, pursuant to the disclosure of interest form in your particular file, expected that either the developer owner or developer contractor or both would have made some disclosure to you? That's based, essentially, on that form filed relatively early in the game?"

A "Yes, sir." (Tr. V: 854, 855)

If there is a kickback between contractor and owner it should be disclosed on the identity of interest

form. The same is true if it was a loan or if the developer and builder are the same entity. The purpose of such a disclosure is to insure that Farmers Home Administration requires a certification of costs of the subcontractors, materialmen, and labor. There already was cost certification when competitive bidding was waived since that action causes an identity of interest.

The Court held in alleged violation of 18 USC, Section 1001 (same code violation as Gilbert) at U.S. v. Gimbel, 830 Fed.Rep. 2d 621 (7th Cir 1987) that:

> In order to be valid, indictment must allege that defendant performed acts which, if proven, constituted violation of law that he or she is charged with violating, and if acts alleged in indictment did not constitute violation of law that defendant had been charged with violating any subsequent conviction based on indictment must be reversed.

In U.S. v. Zangger, 848 Fed. 2d 923 (8th Cir 1988), the Court held:

1. Challenge to sufficiency of indictment is a question of law which the Court of Appeals reviews de novo, and

2. If essential element of the charge has been omitted from indictment, omission is not cured by the bare citation of the charging statute.

U.S. v. Pupo, 841 F.2d 1235 (4th Cir 1988):

When indictment fails to include essential element of offense charged, it thereby fails to charge any federal offense, and conviction under indictment may not stand, provided that omission is timely raised prior to verdict. Fed.Rules Cr.Proc. Rule 12(b), 18 U.S.C.A.

U.S. v. Gilbert, 813 Fed.Sup. 2d (9th Cir 1987):

Issue in judging sufficiency of information is whether information adequately alleges elements of offense, not whether Government can prove case.

U.S. v. Shelton, 848 Fed.2d 1485 (10 Cir 1988):

Federal mail fraud indictment failed to provide county commissioner with

adequate notice that transfer of money or property from victim to defendant was essential element of mail fraud so as to permit defendant to prepare defense. 18 U.S.C.A. 1341.

and

Indictment that does not charge essential element of crime cannot satisfy Fifth Amendment requirement that grand jury consider and find all elements of crime to be present. U.S.C.A. Const.Amend. 5.

U.S. v. Allen, 88-5250 (6th Cir 1989):

In order for an indictment to be sufficient, it must contain the elements of the offense charged and fairly inform a defendant of the charges against which he must defend.

U.S. v. Runnels, 86-1923 (6th Cir 1989):

The point made by Conover is a point that has direct application here. The issue is not what a defendant might have been charged with, but what he was charged with.

This Court already decided the question of whether prejudice will result if the issue is not considered, in order

to raise this issue again. U.S. v. Callanan, 87-2034/2036 (6th Cir 1989).

The essential issue is spelled out in Wharton's Criminal Procedure, 13th Ed. Vol. 2, Indictment and Information, 208.

> Under the Fifth Amendment to the Federal Constitution, no person "shall be held to answer to a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." This provision is binding only upon the federal government.

POINT IV

IN LIGHT OF MODIFIED FINDINGS OF FACT AS CONTAINED IN DENIAL OF MOTION FOR NEW TRIAL THE EVIDENCE IS NOT SUFFICIENT TO SUPPORT VERDICT

The Court now says it based its findings upon the telephone tapes and the interviews of agents with Gilbert as related to the Court. From the Court's Order dated November 23, 1990:

> The real issue then was whether the money received by Gilbert was a loan,

> or for services (or some combination thereof), or whether it was a kickback. Based primarily upon Gilbert's recorded telephone conversations, the Court concluded that the money was a kickback. Gilbert's statements when interviewed in his law office are inconsistent with his present position that the money was a loan. The fact that Granger has now decided to attempt to squeeze some money from Gilbert may tend to impeach Granger's credibility. Gilbert's conviction, however, did not depend upon Granger's credibility. To the contrary, it was apparent at the trial that Granger was a dishonest person.

The Court is now saying that Granger was not honest. The conclusion can then be that he was not honest with Gilbert in the entire loan process and that he did propose a loan.

It is not there factually nor legally, i.e. (factually) the money factually was to be repaid at the time of syndication or in legal services if not syndicated. (Legally) There was no knowledge by the Defendant that the

source of the funds was anything other than Granger's profit, overhead, and general requirements, all Granger's money and there was insufficient proof as to establish no intent to repay and none to establish knowledge of the source being other than Granger.

If Granger's testimony is deleted there is nothing to find all the elements of offense. Even the goverrment in its appeal brief had to quote Granger (discussion elsewhere in Point II).

When the U.S. Attorney answered the Judge at the close of its proofs, (Volume VI, Pages 1062-1063) the Government acknowledged that they "took out of the project" and it may have been profit, not hard costs:

> THE COURT: Even if it came from profit? The kickback we're talking about is not the kickback--you have no evidence he knew of the exact

source of the kickback.

MR. BRUNSON: Other than it was coming out of the project, that's true. The precise source of it, whether it was Glazier or some other material men or some other sub --

THE COURT: Or profit.

MR. BRUNSON: Or profit. I do not have evidence that shows the Defendant was aware of anything other than that the $49,000 was going to be coming out of the project, was going to be cost certified.

He said that on the tape, the tape in the office when Granger told him -- this is a very audible part of the tape near the end of it -- when Granger is talking about how the $49,000 was cost certified, the Defendant said: right, and I don't know if that's a crime or not.

When the Government responded to the

Court on page 1063 (discussed previously) the Government referred to the one body tape, not one of the four telephone tapes. The Court has now stated the verdict was based on telephone tapes.

The tapes have to be evaluated at the time they were made. Gilbert knew he had $49,000 of Granger's money. The warranty problems, equipment failures, and poor construction problems without the slightest amount of help from Granger, his subs or suppliers had brought Gilbert to the point of being reluctant to repay. Gilbert's reluctance to repay does not make for a pretty picture at the time in question. Thanks to suggestions in the second telephone tape, he may have separated legal services from the loan in respect to the corporation more than it really was. One must note, that Gilbert knew Dornet

had filed bankruptcy and did not want a Trustee suing him. He also understood what the nonrepayment looked like.

7-21-86 - Telephone tape
Granger to Gilbert
Sunday evening at home

This was the first telephone call from Granger to Gilbert after over one and a half years. Most of the tape Gilbert complains to Granger about warranty problems. Gilbert also states he has taken no money from the project.

GRANGER: ...I can't find a damn thing covering that 24 grand anywhere, anywhere...

GILBERT: ...I'll talk to David in the morning and see what he says.

GRANGER: Oh...David?

GILBERT: Well, he was the one who was in there to start with and I don't remember how it was done.

David Cole was called to the witness stand by the defense. That discussion

follows the tapes.

7-22-86 - Telephone Tape
Granger to Gilbert

GRANGER: My records show that, well that a, the check went out, $24,000 but I can't uh I can't cover the damn thing right now. I can't find anything...you...If you remember, you was going to represent me in law or some damn thing, some kind of a case.

GILBERT: What you need then, is a paid bill for that?

GRANGER: That's what I need, a paid bill to show it, I guess. Or some kind of...

Even though Gilbert said "paid bill" first, Granger set it up. Also, Granger never got the paid bill. Gilbert never said he would give it to him. He stated that that's what Granger needed. On the next tape, Gilbert asks Granger what he needs and states that he will check his records. No further mention is made of a paid bill.

7-23-86 - Telephone Tape
Granger to Gilbert

GRANGER: That's right. You haven't come up with anything?

GILBERT: I haven't even looked.

GRANGER: Now I don't know. Jesus, did I have to pay that much for that job?

GILBERT: I don't know.
GRANGER: 49 grand?

GILBERT: I don't know. I didn't end up with any, so I don't know.

Granger states that he "paid" for the job. The money came from his funds.

8-04-86 - Telephone Tape
Granger to Gilbert

GILBERT: Well, I told them it was supposed to be an exchange for legal services. Uh...that the...they says, Well, why is it shown on his books as a loan?...I says, Well, I don't know. And I says, it was going to be an exchange for legal services I says then over at the construction job things deteriorated between Ken and I and we didn't

talk the way we should and Ken had other problems so I says maybe he still showed it that way, I don't know.

GILBERT: They says Well didn't you realize this was going to come out of the construction. I says no. I think at the time, I says, Dornet expressed to me the fact that they needed so many jobs in order to cover their overhead, etc. and I says they knew they were still responsible for cost certification. And as far as I know they certified their costs. I says, I don't think he made any money on that job.

GRANGER: Yeah, yeah. Alright.

GILBERT: So, you know, my attitude is that's the way it is.

This reiterates Gilbert's position that there was a loan, and then legal services if not syndicated, and further that he had no knowledge of a hard cost problem.

10-06-86 - Body Tape

The transcript of the body tape, as

prepared by the Government, begins with "Folks sound serious". The trial Court found Gilbert told Granger to "Tell them the truth" (Page 439, Line 9-10, of Transcript).

Gilbert stressed on this tape that money did not come from hard costs. There would have been no project without this loan. Problems developed as a result of a lack of syndication.

Gilbert's explanation of the kickback law is encouraging based on his receipt of loan funds and no payback. It is not encouraging if Gilbert knew of any games with hard costs, that's conspiracy.

Near the end of the body tape, Granger tried to get Gilbert to acknowledge a variance in hard costs. Gilbert told him that's a different problem and advised him to talk to his attorney.

In summary, the body tape is what it is. Granger arrived unannounced with a notice to appear at Grand Jury. Gilbert had $49,000 of Granger's money which was not paid back. Gilbert has looked at the law on kickbacks and talked to an attorney who said, "So what?" The discussion that followed, viewed in that posture, supports the Defendant's position in this case.

Agent's Interview

The entire text of the investigator's testimony is contained within the trial transcript. There was one interview with two agents (Hane and Kortyka) on July 30, 1986.

The agents' version of the interview is that the contractor was selected because of his willingness to fund the project. They also would like the Court to believe that the Defendant said that

one $25,000 check was for past legal services.

Officer Kortyka testified first and did not mention syndication on direct examination. It wasn't until cross examination, after his hand written notes were given to the defense, that he acknowledged that syndication was mentioned.

His handwritten notes were very short and the word "syndication" appeared many times.

Later, Officer Hane, who said he didn't have any hand written notes from that meeting, testified on direct examination at page 923:

A Yes, he was concerned about not being able to syndicate the project. Had he been able to syndicate the project, then he would not have had to obtain this $25,000 check from Ken Granger.

Q Was there a lengthy discussion about syndication? I guess it depends on what I mean by

lengthy; doesn't it?

A The interview was fairly lengthy, but --

Q About how long were you at the Defendant's office all together?

A About an hour and a half.

And on cross examination at page 975:

Q I understood your testimony in that respect.

What I'm asking you is from your understanding of syndication and from what Mr. Gilbert told you when you were talking to him, did Mr. Gilbert relate to you that some of the problems relative to financing the project were related to the syndication not going through?

A Yes, he did.

Q Did he discuss with you some of the warranty problems and complications with the project that led to a falling out with Mr. Granger?

A I was aware of that. I don't believe he discussed that with me up there. I think he just said he had a falling out with Granger.

I was aware of that because of the phone conversation, taped

phone conversations.

Syndication and the timing of its failure is all important to the defense. A project is offered for syndication after application is approved and continues until sold to a point in time after construction is complete.

Other than the difference between whether syndication played a role, "past" legal services, the time an arrangement was made, and warranty and construction problems, there is slight difference in Gilbert's version of the interview as compared to the Agents' version.

Gilbert acknowledged receipt of the $49,000 before the Agents showed the checks. He indicated legal services, loan, the fact that Granger had made contact earlier after over a one and a half year time gap.

The investigators had an inclination

to write their view of the interview from their own prospective. No tape recording was made and only one officer took notes. The officers stated that dates were not clear to Gilbert and that he had no file. Even though they quoted him as having no loan documentation, they said he would look for it. Isn't it incredible that Gilbert would indicate that he completed five hours of work for $25,000 and then say that his relationship with Granger had deteriorated? If there wasn't any more work to do, why would he be concerned about their relationship?

Gilbert did not use the term "selected" in reference to Granger as contractor, but did say that except for these funds there would be no project, thus no contractor. He also does not believe he said "past" legal services. Gilbert knows he stressed the syndication

problem since that caused the arrangement to take place and the Agents down played it in their reports and in their testimony.

David Cole stated he was in Granger's office in Lansing in the summer of 1983. From Page 1094 Mr. Cole testified on direct examination as follows:

> A And Mr. Gilbert was in town, I think he had been with someone regarding a syndication. Any way, he stopped in at the office unplanned, and I was there.
>
> Q Can you describe what happened while you were there?
>
> A I wasn't there very long after he got there. He obviously wanted to talk with Mr. Granger, but he said he was having a lot of problems.

And at page 1098, still on direct examination:

> Q Can you describe what the nature of the meeting was between Granger and Gilbert at that time?

A Mr. Gilbert said he was having a lot of problems finding finances for the project, and that it was a good chance the project could not go ahead.

At that point in time, Mr. Granger said: well, we'd better work out something then in the form of a loan. At that time, I left. I was not involved with anything beyond that point at all. That's the last I heard of it.

And at page 1107, on cross examination:

Q Do you remember the exact words that were used?

A I don't.

Q Do you remember what, if anything, was said by the Defendant prior to the remark made by Granger?

A The only remark he made was when he came in, something about: we've got a lot of problems, I was not able to raise the funds necessary and the project may die, something to that effect.

I don't remember the exact words. That was basically what he said.

Q The remark Granger made, do you remember the exact words that were used by Mr. Granger?

A I don't remember the exact words, something to the effect that: well, we'd better do something, we'd better get a loan or make up a loan or get a loan.

I don't know what he meant by it, but that's what it was.

At page 1113, Mr. Cole was questioned by the Court:

THE COURT: What was said?

A Mr. Gilbert said this project is in danger of not going ahead, because he's not able to find the money necessary or do this syndication.

That's when Granger said: well, we'd better talk about a loan, we'd better work on a loan.

And at page 1116, on cross examination:

Q I realize the specifics of it weren't discussed, but based on what you heard, there was nothing to indicate that for all you knew, from what you heard the loan -- we'd better talk about -- a loan is what you said when the judge asked you about the words that were said, we'd better talk about a loan.

For all you knew, it could have been a loan made by a financial institution to Granger; isn't

that correct?

A That's correct, but that wasn't what Mr. Gilbert was there telling him. He couldn't find the money to do the project vet, he was the one that needed the money.

Mr. Cole's testimony stands unrefuted as to syndication being the problem, summer of 1983 being the time, and a loan being discussed. Even if the trier of fact dismisses the loan, why would Granger lead the Defendant to believe that the money was anything but contractor's funds? Secondly, why wouldn't he lend Gilbert the money with the intent of repayment?

If the loan documentation had been done as a "sham", why would it not have been used for the same? A "sham" would have been brought up quickly to the officers.

Gilbert took the stand and testified that the arrangement was arrived at in the summer of 1983 since the project had not been syndicated. Mr. Granger agreed to lend the money until the project syndicated, if it didn't syndicate, Gilbert was to do legal services for the funds.

Gilbert stated that these funds were not supposed to come from any of the hard costs, to wit, subcontractors, materialmen, or labor. The funds were supposed to be Granger's monies. He further stated that because of warranty work to which he received no response from Granger, he did not feel like repaying Granger; however, he had not taken any management money or return to owner from the project since opening until this issue was resolved. Additionally, he had filled out a

financial form shortly before the investigation began for Straits Area Federal Credit Union. That form did not show Granger as a creditor but did state that the Farmers Home Administration debt was an amount equal to the real mortgage debt plus the debt to Granger.

The tapes, the interviews, and Gilbert's testimony are all to the effect that the money was to come from Granger's part of the contract: profit, general requirement, and overhead in the amount of $73,853. Without Granger's testimony saying otherwise, there is no evidence to find otherwise. This Court can review:

> On trial by court pursuant to waiver of jury trial, under this rule, there is no occasion for motion for judgment of acquittal. U.S. v. De Lune, C.A.Tex.1955, 228 F.2d 114.
>
> Findings of trial court made at conclusion of trial had pursuant to waiver of jury, in prosecution for receipt, concealment and facilitation

> of transportation and concealment of unlawfully imported heroin and for unlawful purchase of heroin were to be reviewed by court of appeals through defendant, appealing on insufficiency of evidence, had made no motion for judgment of acquittal at close of evidence.

Gilbert still maintains evidence at trial as a whole even with the standards of review as cited previously by this Court in U.S. v. Mack, 837 F.2d 254 (6th Cir 1988) do not support conviction.

It is defendant's position that Granger had the Glaser lumber kickback buried in the job from the start. When Gilbert approached Granger in the summer of 1983 it was easy for Granger to lend Gilbert the equity money and if he didn't get it back he wasn't hurting. Granger delayed in the construction process and never fixed or repaired a single construction or warranty problem. Gilbert decided not to repay willingly.

At this point the investigation started.

Other than Gilbert being truthful, there is no reasonable explanation for Mr. Cole's testimony or for the loan documentation. The tapes and the interview, when combined with the testimony of Gilbert and the presumption of innocence, do not warrant a conviction.

POINT V

PERJURY OF GOVERNMENT WITNESS KNOWN TO PROSECUTOR SHOULD RESULT IN MISTRIAL

Kenneth Granger's testimony was needed to support a conviction. The government used Granger's testimony in its appeal brief on page six (Previously quoted in Point II).

The testimony of Kenneth Granger was the key to the government's case, that is why he was given immunity. Later, plea

agreement was made very favorably to Granger.

The Court in U.S. v. Wallach, 89-1544 (2nd Cir. 1991) held:

> ...where the prosecution knew or should have known of the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Perkins v. LeFevre, 691 F2d 616 (CA 2 1982); U.S. v. Agurs, 437 U.S. 97 (1976). Indeed, if it is established that the government knowingly admitted the introduction of false testimony, reversal is virtually automatic.

At the time of Granger's testimony the U.S. Attorney may not have been aware of the perjury but Officer Hane was. He knew he fabricated an exhibit to the Grand Jury so Granger could read the kickback statute to the Grand Jury (Page 946-953 of Transcript). The fact that Granger would identify anything, even if not part of Gilbert's file, added to Hane's understanding that Granger was

lying. Hane himself misled the Grand Jury about Gilbert's statement about the intent to repay (Page 959-964 of Transcript). He knew Granger lied to the Grand Jury about the Glaser/Granger kickback. He had also misled the Grand Jury about Gilbert's experience and familiarity with the forms (Page 953 of Transcript).

At the end of Granger's testimony, Granger even continued these lies to the Judge directly (Page 604 of Transcript):

> THE COURT: Was there any relationship between the amount they were going to pay you and the amount you were paying Gilbert?
>
> A Definitely, yes, there was.
>
> THE COURT: What was the relationship?
>
> A Of the money?
>
> THE COURT: Yes.
>
> A Well, the $24,000 was coming back to me from Glazier Lumber as part of the $49,000 that I got back, or $50,000.

THE COURT: How much did you pay Gilbert?

A $49,000.

THE COURT: How much did you get back from Glazier?

A $49,000, $50,000.

The Government will not change its wrongful methods of prosecution unless all known perjury will result in new trials. Once that standard is applied, the misuse of the courtroom in this regard will stop.

The fact that the Judge now says Granger was a dishonest man and, in essence, that his testimony did not effect the outcome is not significant to this issue. He was the so called other party. He set the stage for the taped conversations, and he was given immunity and subsequent plea benefits. Defendant is entitled to have Granger attempt to

tell the truth.

POINT VI

FAILURE TO PROVIDE MATERIAL TO DEFENSE COUNSEL THAT WOULD HAVE SHOWN GOVERNMENT WITNESS WAS LYING SHOULD RESULT IN MISTRIAL

This trial was supposed to be a full disclosure trial. The Prosecutor stated on page 9 of the transcript: "I have put all the cards on the table."

This trial was not a cat and mouse game as Agent Hane wanted it played. This was Defendant's whole life. Concealment of evidence, even if revealed later, certainly is unfair and increases cost to the defense. Concealment of evidence that allows perjured testimony should not be tolerated.

This court has reversed where there was a complete withholding of Jencks Act and Brady Material at U.S. v. Tencher, 89-3012/3015/3018 (6th Cir 1990). The Court noted that the acts of the

government was "deliberate misrepresentation".

In this case, Officers Hane and Kortyka had the documentation showing the exact amount of money paid back from Glaser to Granger ($59,126) when they went to see Granger initially. There is no doubt that Agent Hane had it when he met with Attorney Brady under a full disclosure agreement and did not give it to him even though they knew that Kenneth Granger had testified at Grand Jury and how important this documentation would be to impeach Ken Granger and show that he was committing perjury (Page 729-739 of Transcript).

An employee of Mr. Gilbert's traveled 250 miles each way to copy the material that the government was to reveal. The material was kept in a file drawer and was not produced (Page 733 to

745 of Transcript). U.S. Attorney Brunson was also misled by Agent Hane (Page 745 of Transcript):

> MR. BRUNSON: I just want to make a statement, Your Honor, that I do recall discussions with Mr. Brady concerning the Brady materials and his desire to see those materials.
>
> And I did some checking with Mr. Hane with respect to those materials. Any after checking with him, I passed on to Mr. Brady telephonically information that whatever he had access to, coupled with whatever I had already given Mr. Brady, comprised the available Granger records that either I or the agency, that being either the OIG or the FBI, had.

Attorney Brady spent hours attempting to establish the true kickback of Glaser to Granger (Page 493 to 604 of Transcript).

It was not until after Granger had testified on two different days and the trial was in the second week that this material became available. The admonishment by the court (Page 749-752 of Transcript) to the defense that the

material was available by subpoena is distressing since the Defendant should be able to rely on the Government's witness giving truthful testimony at Grand Jury and trial and not second guess the Government on known perjury.

It is agreed that the Judge was not asked for a continuance and that he probably would have allowed Granger to be recalled. It is also understood that many cases have held that late is good enough, and that normally the Government does not have to produce material that was available with due diligence. However, the disclosure must be at a time when disclosure would be of value to the accused. Nondisclosure in this case, by implication, meant it was not exculpatory, i.e. Granger must have told the Grand Jury the truth and the Defendant was given a copy of the Grand

Jury testimony. Prejudice of a lying key witness in trial had already occurred by the time the defense had copies. It was all bundled and explained as the accountant for the lumber company had given it to the Agents over a year earlier in exchange for immunity.

POINT VII

VIOLATION OF SEQUESTRATION ORDER SHOULD RESULT IN MISTRIAL

Rule 615 of Federal Rules of Evidence provides for the Exclusion of Witnesses, to wit, "sequestering".

In this case the defense trial attorney asked for sequestering of witnesses and it was granted. Officer Hane was allowed to stay in the Court room to aid in the case.

On Page 467 of the transcript, defense counsel Brady was questioning

Granger:

Q (Mr. Brady continuing): How many times have you talked to the government or government agent in the last couple of days?

A I've been here since Monday night. I sat in the other room all day yesterday, and I'm back this morning. So how many times --

Then continuing at Page 467, line 25:

Q (Mr. Brady, continuing): My question to you, sir, is how many times in the days you have been here have you talked to Mr. Hane, Mr. Kortyka, the assistant United States attorney or people connected with this particular case on behalf of the government?

A I probably talked to them 20 or 30 times.

Q How many times in terms of those discussions were those conversations related to aspects of what your recollection was of certain facts and circumstances as to this case?

A Maybe half a dozen.

Then continuing at Page 477, line 25:

Q The reason you know that is the

government provided you those documents to review most recently?

A That's true.

Q That's the only reason you remember Mr. Shorkey, because if you were to be asked before they showed you the documents whether Shorkey had anything to do with this project at all, you would have said: no, I don't remember Shorkey having anything to do with it. Isn't that right?

A Well, Shorkey had something to do with it, but not at that time.

Q My question was as far as your recollection of Shorkey's involvement, until the government showed you that document, you wouldn't have remembered Shorkey?

A As far as my recollection, that's right.

The key witness was talked to and prompted by the government after hearing testimony in Court to bring his testimony into harmony with what occurred at trial. U.S. v. Greschner, 802 F.2d 373 (10 Cir 1986):

> Rule regarding sequestration of witnesses requires not only that prospective witnesses be excluded from the courtroom, but also that they be prohibited from discussing the case with other witnesses. Fed.Rules Evid. Rule 615, 28 U.S.C.A.

U.S. v. Farnham, 791 F.2d 331 (4 Cir 1986):

> Rule 615 does not require that defendant show prejudice from violation of sequestration request, since strict prejudice requirement would swallow rule carefully designed to aid truth-seeking process and preserve durability and acceptability of verdicts, and exceptions should be narrowly construed in favor of party requesting sequestration.

POINT VIII

IF NONE OF THE ERRORS DISCUSSED PREVIOUSLY IN THE BRIEF ARE SUFFICIENT, CERTAINLY THE CUMULATIVE EFFECT OF THESE ERRORS JUSTIFY RELIEF.

Appellant believes that each matter previously raised justifies relief. But if that is not so, certainly the cumulative effect may result in an unfair trial. Repeated wrongs, though not each in its own right sufficient to cause a

retrial, will blur the issues for decision and prejudice the defendant.

The court said in United States v. Guglielmini, 384 F.2d 602, 607 (2d Cir. 1967):

> We do not hold that any one of the errors committed during the trial would have required reversal of the convictions. We do hold that occurring at the same trial, the total effect of the errors we have found was to cast such a serious doubt on the fairness of the trial that the convictions must be reversed.

See, also, United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970); United States v. Bledsoe, 531 F.2d 888 (8th Cir. 1976).

Conclusion

The newly discovered evidence is of such a nature that if the case was retried there would be an acquittal.

The Findings of Fact have, in effect, been modified by the Decision on the denial of the Motion For New Trial.

The trial court has discredited the testimony of the key witness and stated that it relied upon certain tapes and interviews. This modification allows the Court to review the entire case on appeal.

There was not sufficient evidence to find that Gilbert knew that any money was coming out of hard costs. Only Kenneth Granger testified to that fact.

The conduct of using perjured testimony was in fact further concealed by the Federal Officer's nondelivery of exculpatory evidence (impeaching). It is important that Granger testified that he got the same amount of money, dollar for dollar, from the lumber supplier that he advanced to Gilbert. This testimony indicated a plan, knowledge on Gilbert's part of the arrangement, and it put the timing early on in the contract

relationship between Granger and Gilbert. In contrast and in fact, the contractor (Granger) received back from the lumber supplier $10,126 more than he advanced to Gilbert. Thus, in fact, the Glaser-Granger arrangement took place without the Granger-Gilbert arrangement. This, in fact, gives an understanding as to why Granger would propose a "loan" arrangement between himself and Gilbert to save the job. Once the perjured testimony was placed before the trier of fact it could not be undone.

The importance of this material is demonstrated by the time defense counsel spent with Mr. Granger on the stand attempting to prove a difference between the funds Granger loaned to Gilbert and the funds Granger actually received from the lumber supplier. Officer Hane sat there, knowing he had the necessary

documentation, probably in his briefcase, and knowing Granger was lying.

The trial court has never said in any Findings how he dismissed Gilbert's testimony or showed the inconsistence of that with the Officer's testimony of the interview, nor why he dismissed Gilbert's testimony with regard to the tapes. There was nothing in the tapes to provide enough for a conviction.

Important to the Defendant's case is the timing of the arrangement between himself and Granger. Syndication can only occur after the application is accepted by Farmers Home Administration, after the September 17, 1982, closing at Elk Rapids (Also the date of Count 2 and 3 of Indictment). There is nothing to offer to individuals seeking tax shelters since you do not have a project to offer. The defense called David Cole who

testified that in the summer of 1983 he was in Granger's office in Lansing when Gilbert came in distressed about lack of syndication and financing. He further testified that Granger proposed a loan at that meeting. The trial court does not mention this event in any respect in its Findings.

If this case was retried, no jury would conceivably convict once they hear Ken Granger tell them the truth. The Promissory Notes exist, Glaser gave Granger back $10,126 more than the $49,000 Gilbert received, the loan arrangement came about in the summer of 1983 after all estimates had been firm for nine months, and, most importantly, that he retained an attorney to collect the Promissory Note six years after its execution. The note still exists even though Granger denied it existed at the

original trial.

By 1986, Gilbert, because of poor construction, warranty problems, and no response from Granger for over a year was reluctant to repay the loan. The first telephone tapes indicate that Gilbert did not acknowledge anything. He always said he would have to look at his file. When the situation became serious, Gilbert never changed position with the Agents, Granger, or the Court.

Dated: April 9, 1992

Respectfully submitted,

James R Gilbert

JAMES R. GILBERT (P13971)
In Pro Se
1010 South Main Street
Cheboygan, MI 49721
Phone: 616-627-5636

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. File No.87-CR-20014-BC

JAMES R. GILBERT,

Defendant.
_____/

FINDINGS OF FACT
UPON TRIAL WITHOUT JURY

Pursuant to Rule 23(c), Federal Rules of Criminal Procedure, the Court makes the following general findings and the following findings of fact specially.

The Court finds the defendant, James R. Gilbert, guilty of the offense charged in Count 1 of the Indictment and not guilty of the offense charged in Count 4 of the Indictment.

This case involves statements made by the defendant on various loan documents

submitted to the U. S. Department of Agriculture's Farmers Home Administration (FmHA).

For several years the defendant has been a licensed attorney practicing law in Cheboygan, Michigan, which is in the Eastern District of Michigan. From the spring of 1982 to August of 1984, the defendant undertook, as developer, the development of a low-income multiple housing unit in Onaway, Michigan, which is also in the Eastern District of Michigan. The project is called Jamestown Apartments. The project was undertaken in the name of Gilbert Apartment Company, a Limited Partnership. The defendant and his wife, Kathleen, were then and are the general partners in the Gilbert Apartment Company. There are no lirited partners.

As an aspect of national housing policy, the government has established a

program to encourage construction of housing units for low-income individuals residing in rural areas where a demonstrated need exists for such housing. Prospective developers submit an application to the FmHA. FmHA regulations specify qualifications for low-interest terms, and tax shelter possibilities exist to encourage would-be developers to apply. The developer is required to take on a risk by putting in an initial five percent equity from his own funds and an initial two percent operating reserve, also from his own funds.

The Gilbert Apartment Company applied for a rural rental housing loan, which application was approved on September 17, 1982, subject to the satisfactory fulfillment of certain conditions stated in the Approval Memorandum. On the same date, the defendant signed a loan

agreement and request for obligation of funds in the sum of $672,600.

Sometime in the spring or early summer of 1982, the defendant met Kenneth Granger who operated a construction firm known as Dornet Village.

Granger built the project. On or about October 20, 1983, Granger made out and delivered a check to the defendant for $24,000 which the defendant cashed. On or about March 5, 1984, Granger made out and delivered a check drawn on Dornet Village, Inc. to the defendant in the sum of $25,000 which he also cashed.

Granger financed the $49,000 payments to the defendant by arranging kickback money from Glasers Lumber Company in connection with lumber purchases for the project.

In July of 1986, the defendant was interviewed in his law office by FBI Agent Kortyka and Department of

Agriculture Investigator Hane.

The Court's finding with respect to Count 4 is based upon the government's failure to prove that the Certificate of Actual Cost, Farmers Home Administration Form 1924-13, was delivered by mail. The law with respect to the mail element of an 18 U.S.C. 1341 offense is generous to the government. In this case, the Grand Jury elected to base the mail fraud charge upon the delivery of one particular document by mail. This particular document was probably delivered by mail, but the circumstantial evidence does not convince the Court of this fact beyond a reasonable doubt.

The evidence is sufficient, however, to convince the Court by a preponderance of the evidence that the document was made and signed in the Eastern District of Michigan before it found its way to Escanaba, thus the venue element of Count

1 is established.

It is established that the defendant signed the completed document referred to in Count 1 as Form 1924-13 which then contained the following representation:

> All amounts shown have been reduced to give effect to the amount(s) of any kickbacks, rebates, adjustments, discounts, or any other devices which may have or have had the effect of reducing the actual cost, and all amounts shown above as "to be paid in cash" will be so paid within forty-five (45) days.

The document was sent by the defendant to the FmHA office in Escanaba, Michigan, in the Western District of Michigan.

The defendant argues that by use of the word submission, the government limited itself to acts occurring at the point of delivery.

That does not mean that it was submitted only in Escanaba. The word "submit" includes the act of sending it on its way by mail or otherwise.

The Court finds beyond a reasonable doubt that the defendant made and submitted for Farmers Home Administration of the U. S. Department of Agriculture a Certificate of Actual Cost, Form FmHA 1924-13, containing the foregoing representations and that this occurred on or about July 30, 1984, and that such submission was in a matter within the jurisdiction of a department or agency of the United States as charged in Count 1 of the Indictment.

The word "kickback" in the last paragraph of FmHA 1924-13 includes every form of clandestine rebate, adjustment or discount, so it does not matter whether the $49,000 payment made to the defendant may be traced directly to a contract payment to Granger or Dornet Village, Inc.

There is some conflicting evidence whether the $49,000 paid to Gilbert was

in whole or in part a loan. It is not essential to the Court's finding of guilt whether the defendant prepared or gave Granger or Dornet Village, Inc. one or more notes to cover all or a part of the $49,000. It is absolutely clear from the evidence that neither Gilbert nor Granger intended that the money would ever be paid back. To the extent that there is documentary evidence to support a loan theory, the Court finds that such documentary evidence was created as a subterfuge to mask the true nature of the payment as a kickback. This is true whether the agreement between them and whether the documentary evidence were created before or after Gilbert became a target of the investigation. Granger's testimony that there was a mutual understanding of nonrepayment is totally confirmed by the content of the conversations between Gilbert and

Granger. Likewise, there was no intention on the part of either Gilbert or Granger that the $49,000 or any part of it was in payment for past or future legal services.

The fact that there was an undisclosed kickback to the defendant does not by itself establish that the paragraph of the form contained a false representation. It is a false statement only if the kickback may have had or did have the effect of reducing the actual cost of the project.

Had the whole truth been known to the Farmers Home Administration, it would have had the effect of reducing the cost of the project because the whole truth would have included the fact that the project was financed by another undisclosed kickback to the contractor.

The defendant's certification was with reference to Lines 51 through 60.

Lines 51 through 60 include the total figure of $592,251 plus the builder's profit of $14,141. There was no evidence that the defendant had knowledge of the exact source of the $49,000, but the Court finds that the defendant had knowledge that the $49,000 kickback had a source hidden somewhere in the $606,392 construction cost and, at the very least, knew that there was a kickback to him which may have had the effect of reducing the actual cost of the project.

The Court finds beyond a reasonable doubt that the defendant knowingly made a false statement in a document submitted to the Farmers Home Administration as charged in Count 1 of the Indictment.

Was this a willful, false and fraudulent representation? The Court finds beyond a reasonable doubt that it was. From the total evidence, the Court finds that the false representation was

made as a part of a fraudulent conspiracy between Gilbert and Granger by which, in exchange for obtaining the contract, Granger would kickback to Gilbert the five percent and two percent which the owner was required to provide with his own funds. The only hope that Gilbert had of raising the necessary money was by syndication and there was no realistic expectation of successful syndication during the period of time when the kickbacks were made. It is far more likely than not that the fraudulent kickback scheme had been negotiated prior to September 17, 1982, when the defendant represented that $34,400 and $14,160 would be contributed by his own funds, but this fact is not essential to the Court's finding. The defendant was familiar with the content of the final certification when it was submitted and he intentionally misled the government

agency to induce it to close the loan.

The finding that the defendant knowingly and intentionally made and submitted the false statement with knowledge of falsity is beyond a reasonable doubt.

Finally, the Court finds beyond a reasonable doubt that the representation in the false statement was material. It was intended to be and was relied upon by the FmHA in making the loan.

/S/
JAMES P. CHURCHILL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. File No. 87-CR-20014-BC

JAMES R. GILBERT,

Defendant.
_____/

ORDER DENYING MOTION FOR NEW TRIAL
OR IN THE ALTERNATIVE
FOR EVIDENTIARY HEARING

The defendant's motion for new trial or for an evidentiary hearing is denied for reasons set forth herein.

It is unnecessary for the Court to summarize the record of its prior findings and orders.

For the purposes of ruling on the motion, the Court will assume that a promissory note with defendant Gilbert's signature thereon has been found and that

an attorney has threatened suit thereon. The Court will also assume the possibility that suit has actually been commenced or that suit actually will be commenced. The Court will also assume the possibility that a judgment may be entered against Granger in such a suit. Such facts would not change the Court's ruling.

In the Court's Findings of Fact Upon Trial Without Jury, it was explained that the conviction did not depend on the existence or nonexistence of a promissory note or notes. The real issue then was whether the money received by Gilbert was a loan, or for services (or some combination thereof), or whether it was a kickback. Based primarily upon Gilbert's recorded telephone conversations, the Court concluded that the money was a kickback. Gilbert's statements when interviewed in his law office are

inconsistent with his present position that the money was a loan. The fact that Granger has now decided to attempt to squeeze some money from Gilbert may tend to impeach Granger's credibility. Gilbert's conviction, however, did not depend upon Granger's credibility. To the contrary, it was apparent at the trial that Granger was a dishonest person.

The Court finds that the "newly discovered evidence" would in all probability not produce an acquittal.

/s/
JAMES P. CHURCHILL
UNITED STATES DISTRICT
11/23/90

No. 90-2327

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
vs.	)	ORDER
	)	
JAMES R. GILBERT,	)	
	)	
Defendant-Appellant.	)	
	)	

BEFORE: KENNEDY and JONES, Circuit Judge, and CONTIE, Senior Circuit Judge.

James R. Gilbert, an attorney proceeding pro se, appeals the district court's order denying his motion for a new trial brought pursuant to Fed. R. Crim. P. 33. This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Gilbert was indicted in February 1987 on three counts of making false statements to the government, in violation of 18 U.S.C. s 1001, and one count of mail fraud, in violation of 18 U.S.C. s 1341. The government alleged that Gilbert falsely represented that the final cost of a housing project he developed as shown on Farmers Home Administration (FmHA) Form 1924-13 had been reduced by the amount of any "kickbacks, rebates, adjustments, discounts, or any other devices" which would reduce the actual cost of the project. Gilbert was convicted following a bench trial of one count of making a false statement. The district court rejected Gilbert's claim that the money was a loan and/or payment for future legal services. Instead, it found that Gilbert had received kickbacks in the amount of $49,000 which he had

misrepresented on Form 1924-13 submitted to the FmHA on July 30, 1984. Gilbert was sentenced to six months imprisonment, with a recommendation of parole after serving two months. A panel of this court affirmed Gilbert's conviction on direct appeal. Gilbert's motion for a new trial, based upon alleged newly discovered evidence, was denied on September 6, 1988 following a hearing. That denial was not appealed. Gilbert's sentence of confinement was completed in March 1989.

Gilbert's present motion for a new trial or, in the alternative, for an evidentiary hearing, is also based upon newly discovered evidence. He alleges that Granger, the general contractor, recently demanded repayment of a $25,000 promissory note signed by Gilbert. Gilbert claims that this evidence proves that the money received from Granger in

connection with the housing project was a loan rather than a kickback and "renders [the] court's previous opinion as to the intent of Granger erroneous." The district court denied the motion in an order filed November 26, 1990, on the basis that Gilbert's conviction did not depend on whether or not promissory notes existed. The district court explained this conclusion as follows:

> Based primarily upon Gilbert's recorded telephone conversations, the court concluded that the money was a kickback. Gilbert's statements when interviewed in his law office are inconsistent with his present position that the money was a loan. The fact that Granger has now decided to attempt to squeeze some money from Gilbert may tend to impeach Granger's credibility. Gilbert's conviction, however, did not depend upon Granger's credibility. To the contrary, it was apparent at the trial that Granger was a dishonest person.

J.A. at 59.

Gilbert raises eight issues on appeal: (1) the district court abused its discretion in denying his motion for

a new trial; (2) the order denying his motion is a modified, new, or real finding of fact, but Gilbert was earlier denied the same; (3) the district court's findings of fact constitute an unconstitutional judicial amendment to the indictment; (4) the evidence is not sufficient to support his conviction, in light of the modified findings of fact; (5) the prosecution knowingly used perjured testimony; (6) the prosecution did not provide material revealing the perjury to defense counsel; (7) there was a violation of the sequestration order; and (8) the cumulative effect of the above errors justifies relief.

Upon review, we conclude the district court did not abuse its discretion in denying Gilbert's motion for new trial or evidentiary hearing. See United States v. Word, 806 F.2d 658, 666 (6th Cir. 1985), cert. denied, 480 U.S. 922 (1987).

Motions based upon grounds other than newly discovered evidence must be brought within seven days after a finding of guilt. Motions based upon newly discovered evidence must be brought within two years of such a finding. Because this motion was filed more than seven days but less than two years after the Sixth Circuit's mandate in this case, this motion may be based only upon the allegation of newly discovered evidence. See Fed. R. Crim. P. 33; United States v. Fiddler, 688 F.2d 45, 48 n.12 (8th Cir. 1982) (per curiam); United States v. Lara-Hernandez, 588 F.2d 272, 275 (9th Cir. 1978)(per curiam). Gilbert's complaints about his trial proceedings are untimely.

"Motions for a new trial based on newly discovered evidence are disfavored and a trial court's determination that a new trial is not warranted will not be

reversed absent 'clear abuse of discretion.'" United States v. O'Dell, 805 F.2d 637, 640 (6th Cir. 1986), cert. denied, 484 U.S. 859 (1987). Gilbert has not met this standard.

Accordingly, the district court's order, filed November 26, 1990, is hereby affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

_____

Clerk